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COUNTY OF KERN

OFFICE OF THE DISTRICT ATTORNEY

POLICY MANUAL

Subject: Brady Policy Regarding Peace Officers and Government Witnesses

INTRODUCTION

In *Brady v. Maryland* (1963) 373 U.S. 83, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution (*Id.* at 87). It is the policy of the Kern County District Attorney's Office to strictly adhere to our *Brady* obligation. The Kern County District Attorney's Office written policy and procedures are designed to achieve this goal, as well as develop county-wide uniformity in the way *Brady* issues are resolved. *All Kern County deputy district attorneys are required to be familiar with and to follow these policies and procedures.*

In no area has the prosecution's obligation under *Brady* been more difficult in its application than in the area of allegations of police misconduct. Allegations of police misconduct come to our attention in a number of ways. For example, cases are sometimes submitted to the District Attorney in which the law enforcement officer is a suspect in a crime. On other occasions deputy district attorneys in the course of case review or litigation develop concerns whether certain observed, reported, or documented officer conduct falls within the purview of the *Brady* case law.

Whether allegations of police misconduct rise to the level of "evidence material to guilt or to punishment" can be a very difficult determination. The difficulty of this determination is compounded by the fact that much more than legitimate due process rights of the accused are at stake. Also at stake are the equally legitimate privacy rights of involved officers, as well as the obligation of the District Attorney to be fair in the resolution of factual disputes that may have significant consequences for an officer's career. It is the intent of this policy and these procedures to balance these interests carefully, while at the same time fully adhering to our constitutionally mandated obligations under *Brady*.

California Penal Code section 832.7(a) specifically allows the District Attorney access to peace officer personnel records in "investigations or proceedings concerning the conduct of police officers." The Kern County District Attorney's Office may utilize this right of access as necessary when involved in investigations of specific allegations of suspected criminal wrongdoing by peace officers. In doing so, we will follow the confidentiality rules which may apply under California Evidence Code sections 1043 and 1046, or any other applicable provision of law, before any disclosure of such information is made.

Absent involvement in an investigation of specific allegations of criminal wrongdoing by a peace officer, the Kern County District Attorney's position is that no case or statute authorizes or justifies a review of peace officer personnel files. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463). This position was reaffirmed by the Supreme Court in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696. This position is taken in recognition of the fact that law enforcement agencies have a compelling interest in documenting officer misconduct, without undue concern that this information will be misused to unfairly jeopardize an officer's future effectiveness. If law enforcement agencies must do business in an environment in which all documented disciplinary action and performance reviews are subjected to outside scrutiny without proper safeguards, this is likely to have a chilling effect upon the agencies' willingness to document and to appropriately address officer misconduct.

Moreover, in California there exists case law and a statutory scheme, see, e.g., *Pitchess v. Superior Court* (1974) 11 Cal.3d. 531, and its legislative progeny, see Evidence Code section 1043 et seq., in which both the state's highest court and the legislature have defined the manner in which reviews for material evidence in police officer personnel files are to be conducted. In *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, the California Supreme Court unanimously found that (1) prosecutors must comply with the *Pitchess* procedures if they seek information from law enforcement confidential personnel files and (2) that the prosecution satisfied its *Brady* duty by disclosing to the defense the information it had received from the law enforcement agency that a testifying officer's file may have material exculpatory information in it.

This decision protects the confidentiality of law enforcement personnel files and puts the burden back on defendants to make *Pitchess* motions if they want the material. Further, the Supreme Court held the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records.

We understand that this area of law is dynamic. Thus, modifications and refinement of the policy and these procedures will be necessary as further guidance is received from the courts or the legislature.

CHAPTER ONE

GOVERNING STATUTES AND CASE LAW

I. *BRADY V. MARYLAND* (1963) 373 U.S. 83

In *Brady v. Maryland*, the Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request *violates due process* where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*" *Brady v. Maryland*, supra, at 87 (emphasis ours); see also *Izazaga v. Superior Court* (1991) 54 Cal.3d. 356, 377-378.

In *Strickler v. Greene* (1999) 527 U.S. 263, 280-281, the Supreme Court said:

> In *Brady* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution." [*Brady v. Maryland, supra,* 373 U.S. at 87.] We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, [*United States v. Agurs* (1976) 427 U.S. 97, 107], and that the duty encompasses impeachment evidence as well as exculpatory evidence, [*United States v. Bagley,* (1985) 473 U.S. 667, 676]... Such evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* At 682; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434.

In *Strickler v. Greene, supra* at 281-282, the Supreme Court reiterated that:

> "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, *either* willfully or inadvertently; and prejudice must have ensued."

In order to constitute a *Brady* violation, the suppression of favorable evidence must prejudice the defendant. The suppression of favorable evidence produces prejudice to a defendant only if the suppressed evidence is "material." Evidence is "material" only if "'there is reasonable probability' that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler v. Greene, supra* at 289.

Thus, prosecutors are required to disclose to the defense evidence favorable to a defendant that is either *exculpatory* or *impeaching* and is *material* to either *guilt* or *punishment.* Evidence is "favorable" to the defendant if it either helps the defendant or hurts the prosecution. *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.

In order to ensure compliance with these rules, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to *err on the side of disclosure. Kyles v.*

Whitley, supra, 514 U.S. 419, 440. "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs, supra* 427 U.S. at 108.

As prosecutors, therefore, we have to determine whether *Brady* evidence exists *before* trial. In making this assessment, the individual deputy *shall* utilize these definitions and guidelines.

A. MATERIAL EVIDENCE

As noted in the *Strickler* decision, evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. A "reasonable probability of a different outcome" is shown where *suppression of Brady material undermines confidence in the outcome.* Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. *Kyles v. Whitley, supra; United states v. Bagley, supra; People v. Padilla* (1995) 11 Cal. 4th 891, 929-32; *People v. Clark* (1992) 3 Cal.4th 41, 133-34.

B. EXCULPATORY EVIDENCE

"Exculpatory evidence" is evidence favorable to the defendant and likely to change the result on an issue of a defendant's guilt or his or her eventual punishment if convicted.

C. IMPEACHMENT EVIDENCE

Evidence that may be used to impeach a witness's credibility falls within the *Brady* rule. Impeachment evidence is defined in Evidence Code section 780 and in CALJIC 2.20. Examples of impeachment evidence that may come within the *Brady* rule are as follows:

1. Witness' character for honesty or veracity or their opposites. Evidence Code section 780(e).

2. The existence or nonexistence of a bias, interest or other motive. Evidence Code section 780(f).

3. A statement made by a witness that is inconsistent with any part of his testimony at the hearing. Evidence Code section 780(h).

4. Felony convictions involving moral turpitude. Evidence Code section 788.

5. Facts establishing moral turpitude, including misdemeanor conduct. *People v. Wheeler,* 4 Cal. 4th 284, 295-297.

6. False reports by a prosecution witness *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.

7. Pending criminal charges against a prosecution witness *People v. Coyer* (1983) 142 Cal.App.3d 839, 842.

8. Parole or probation status of the witness. *Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.

9. Evidence contradicting a prosecution witness' statement or reports. *People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569.

10. Evidence undermining a prosecution witness' expertise (e.g., inaccurate statements or expert opinion). *People v. Garcia (1993) 17 Cal.App.4th 1169, 1179.*

11. Evidence that a witness has a reputation for untruthfulness (3 Witkin, *California Evidence* (4th Ed. 2000) *Presentation at Trial,* § 288-290); *see Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463 [Evidence that a prosecution witness has a reputation for manipulation and dishonesty is evidence tending to exculpate the defendant and must be disclosed to the defendant.]

12. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.

13. Promises, offers or inducements to the witnesses, including a grant of immunity. *United States v. Bagley, supra,* at 676-677; *Giglio v. United States* (1972) 405 U.S. 150, 153-155.

14. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness' truthfulness, bias or moral turpitude. *cf. People v. Wheeler, supra,* at 293. [Not excessive force, as *Pitchess* motion is the appropriate mechanism.]

A *thorough* review of all other types of information must be made before a determination is reached that evidence concerning the credibility of a material prosecution witness is impeachment evidence.

D. USE OF FORCE EVIDENCE

Evidence of a witness' prior use of excessive force will be processed, maintained and provided through the *Brady* procedures within the District Attorney's Office.

E. WHAT IS NOT *BRADY* MATERIAL

The prosecution has no obligation to communicate preliminary, challenged or speculative information. (*United States v. Agurs, supra,* 427 U.S. 97, 109, fn. 16)

Allegations that cannot be substantiated, are not credible, or have been determined to be unfounded *are not considered impeachment material.*

II. STATUTORY DUTY UNDER THE CRIMINAL DISCOVERY STATUTE

A prosecutor in California *also* has a statutory duty to disclose any exculpatory evidence or evidence arguably favorable to the defense at least 30 days prior to trial. (*See* Penal Code sections 1054.1(e), 1054.7). This includes disclosing any information to the defense received from a law enforcement agency that a testifying officer's file may contain material exculpatory information. See *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696.

CHAPTER TWO

PROCEDURES AND STANDARDS

I. COUNTY LAW ENFORCEMENT AGENCIES

A. DUTY TO DISCLOSE

The Office of the District Attorney is committed to upholding a criminal defendant's rights to a fair trial and due process of law. We recognize that the effective enforcement and prosecution of crime is jeopardized by the failure to comply with discovery law and that such violations may result in the reversal of convictions, sometimes years after the trial is concluded. More importantly, we recognize that the honesty of law enforcement employees is a cornerstone of our criminal justice system. On those rare occasions when a law enforcement employee has engaged in conduct that has a negative bearing upon his or her credibility, we are obligated to disclose this information as required by law.

The Office of the District Attorney has adopted a procedure in which it requests local law enforcement agencies to advise the District Attorney's Office of the names of officers who have information in their personnel files that may require disclosure under *Brady*. This advisement, if provided, is followed by an invitation to defense counsel to pursue the *Pitchess* motion procedure, whereby potential impeachment or exculpatory material is gathered by the agency so it can be reviewed in-camera by a court. This utilizes an appropriate judicial forum to reconcile a defendant's constitutional right to a fair trial with a law enforcement employee's right to confidentiality. The *Pitchess* procedure described herein shall also apply to personnel records of peace officers employed by the District Attorney's Office.

For purposes of this policy, "*Brady* material" in personnel files of law enforcement agency employees is defined to include:

1. Any sustained finding of misconduct that reflects upon the truthfulness or bias of a witness. A complaint is considered sustained for purposes of this policy when it has been approved by the agency head after a hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, if applicable, or when the discipline has been imposed, whichever occurs first. If a sustained complaint has already been overturned by a reviewing body or court based on lack of evidence of misconduct, the incident will not be considered *Brady* material and need not be reported to the District Attorney's Office. If a sustained complaint has been overturned based only upon the degree of discipline imposed, it shall still be considered a sustained complaint and shall be reported to the District Attorney's Office. If the law enforcement agency has notified the District Attorney's Office of *Brady* information and the officer later successfully appeals the sustained complaint to a reviewing body or court, the officer should provide the District Attorney's Office with a copy of the decision on appeal so that we may reevaluate the matter.

2. Any past convictions or pending criminal charges for a felony or a misdemeanor involving moral turpitude.

B. LAW ENFORCEMENT RESPONSIBILITY

In order to meet constitutional *Brady* obligations and to ensure that law enforcement's statutory right to confidentiality is upheld, the District Attorney requests that each law enforcement agency search its records concerning employees of that agency. A personnel file review is requested for all peace officer employees, as well as for all Sheriff's Service Technicians, Police Services Officers, Criminalists, Evidence Technicians, Dispatchers, and other employees whose job duties may include handling evidence, documenting incidents relating to criminal cases, or who are likely to testify in criminal cases.

It is essential that this responsibility be carried out by a qualified representative of the law enforcement agency. All parties may best be served when the representative conducting the initial screening process is an attorney employed by County Counsel, the City Attorney, or other qualified counsel with legal training in this specialized area. This type of review by law enforcement agencies was impliedly approved in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696.

C. PROCEDURES

1. If potential *Brady* materials exist, the agency representative will notify the District Attorney's Office, specifically the Chair of the *Brady* Committee and inform him or her of the existence of the materials. The response in writing to the District Attorney's Office will state only that there may be *Brady* material regarding the employee or (or that a sustained complaint was made against the employee) and the date the information was entered into the record. No actual materials from the file will be provided to the District Attorney's Office. The law enforcement agency shall provide the same written notification of its findings to the involved employee.

2. After the initial notification has been made, if the law enforcement agency learns of any additional potential *Brady* material regarding an employee, the agency shall notify the District Attorney's Office of the existence of the additional information.

3. A "*Brady* Police List" of law enforcement employees for whom *Brady* material exists or law enforcement agencies have given notification that possible *Brady* material may exist shall be maintained on the "K" Drive of the office computer system. Deputy district attorneys must review the list prior to the preliminary hearing and during trial preparation to determine whether a law enforcement employee who is subpoenaed by or will testify on behalf of the prosecution is on the list. Upon the request of any employee or former employee of a law enforcement agency, the Chair of the *Brady* Committee shall immediately advise the employee whether he or she is included on the Agency List.

4. When the District Attorney's Office subpoenas or intends to call a law enforcement officer on the *Brady* Police List, for whom notification of possible *Brady* material has been given by a law enforcement agency, the deputy district attorney shall invite the defense attorney to bring the appropriate motion. Said invitations are to be

documented in writing, mailed to the defense attorney, with a copy maintained in the case file. The request for in-camera review for peace officers should be made pursuant to *Pitchess,* (see Evidence Code sections 1043, et seq.) As to non-sworn employees, the request should be made pursuant to Evidence Code sections 1040 and 915(b).

II. DEPUTY DISTRICT ATTORNEY AND SUPERVISOR RESPONSIBILITIES

A. INITIAL EVALUATION PROCESS

The District Attorney's Office sometimes learns of potential law enforcement employee misconduct outside of the procedure described in Section I. above or outside of an in-camera review procedure. For example, evidence of untruthfulness may come to light during a criminal trial or from credible reports of other law enforcement employees, based on sources other than personnel records.

1. If a Deputy District Attorney or any staff member becomes aware of potential *Brady* information regarding a peace officer or a governmental witness (e.g., members of the crime lab) as defined in this policy, the deputy or staff member *shall* inform the appropriate supervising deputy district attorney.

2. If the supervising deputy believes the information may constitute *Brady* material, he will direct the deputy district attorney to prepare a memorandum summarizing the material at issue and setting forth their conclusions.

3. The memorandum shall detail the name of the witness, the agency involved, the date the information was received, the source of the information, the existence of any protective or limiting court orders regarding future dissemination, and the nature of the information. The deputy shall also obtain any relevant source documents that are available that bear on the decision, such as police reports, transcripts, witness statements, charging documents, etc. and provide them with the memorandum to the supervising deputy district attorney.

4. The memorandum will relate facts supported by objective data and not contain speculation, rumor or opinion. If the only information available is that the officer is under investigation by his own department, then that shall be stated. The memorandum shall also address whether or not the conduct or information constitutes a potential crime.

5. The supervising deputy district attorney shall present the memorandum and evidence to the *Brady* Committee for its recommendation.

6. The Committee shall conduct an initial evaluation of the memorandum and materials submitted and submit a recommendation to the Assistant District Attorney.

7. If it is determined by the Assistant District Attorney that *Brady* material exists, the witness' name shall be maintained on a *Brady* list on the shared "K" drive of the office computer system.

8. The District Attorney's Office sometimes learns of potential law enforcement conduct outside the above-described procedures relating to "use of force" issues. If a deputy district attorney becomes aware of potential misconduct by a peace officer involving use of force, the same procedures outlined herein regarding *Brady* information shall be followed. With the exception being any information discovered by the deputy as a result of disclosures made pursuant to a *Pitchess* or other in-camera motion. The information derived from *Pitchess* cases should be limited to the name of the officer, the underlying *Pitchess* case name and number, and the existence of any protective or limiting order regarding future dissemination of information. If it is determined by the Assistant District Attorney that use of force material exists, the witness' name shall be maintained on the office's "*Brady* Police List" on the shared "K" drive of the office computer system. The deputy will either be providing the defense the *Brady* material or informing the defense of the need to bring a *Pitchess* motion. The providing of *Brady* material or advisal to file a motion shall be documented in writing and delivered to the defense attorney, with a copy maintained in the case file.

B. PROCEDURE WHEN *BRADY* MATERIAL IS DISCOVERED DURING TRIAL OR UNDER TIME CONSTRAINTS

1. If the potential *Brady* material is discovered during trial or under other circumstances where there is insufficient time for a memorandum to be written and the *Brady* Committee to meet, the supervising deputy district attorney will evaluate and make a decision to elect one or more of the following options:

    a) Turn the material over to the defense forthwith.

    b) Have the trial deputy request an ex parte in-camera hearing with the trial judge. *See* Penal Code section 1054.7.

    c) Have the trial deputy invite the defense attorney to make a *Pitchess* motion to review peace officer personnel files. *See* Evidence Code section 1043.

    d) Have the trial deputy file a *Pitchess* motion to review peace officer personnel files.

2. The deputy district attorney shall seek a protective order for any materials that are not a matter of public record that are to be turned over to the defendant (see attached "Sample Protective Order"). The trial deputy shall also notify the appropriate agency or its counsel of such action.

3. As soon as time permits, the deputy will complete the *Brady* memorandum as outlined above and the supervising deputy will present the material to the *Brady* Committee for further review, normal processing, and, if appropriate, dissemination to other deputy district attorneys.

III. LABORATORY EMPLOYEES

The Director of the District Attorney's Forensic Science Division shall be responsible for submitting to the *Brady* Committee on an ongoing basis, a list of all criminalists, who may testify as experts, with any quality assurance issues or other issues which may be evidence of impeachment material subject to the *Brady* rule. Such materials may include, but are not limited to, results from proficiency tests, quality variance reports, and removal from case work.

The Committee shall conduct an initial evaluation of the materials submitted and submit a recommendation to the Assistant District Attorney.

If it is determined by the Assistant District Attorney that *Brady* material exists, that criminalist's name shall be placed on a separate "*Brady* Lab List." The Laboratory List of criminalists with *Brady* materials shall be maintained on the shared "K" drive of the Office's computer system. The Chief Criminalist and the *Brady* Committee will assure that the impeachment materials are available in a hard copy packet securely maintained under the direction of the Assistant District Attorney for discovery when said criminalists are subpoenaed by or will testify on behalf of the prosecution. Deputy district attorneys must review the Laboratory List during trial preparation to determine whether such *Brady* materials exist.

The Laboratory Director will also be responsible to bring to the attention of the *Brady* Committee any problems with laboratory equipment by maintenance, calibration, or in any other ways which may affect its reliability. The *Brady* Committee in consultation with the Laboratory Director will conduct an initial evaluation of the materials submitted and forward a recommendation to the Assistant District Attorney for a final determination of whether *Brady* material exists and, if so, the appropriate course of action to be taken.

IV. *BRADY* POLICY COMMITTEE

A. MEMBERS OF THE COMMITTEE AND PROCEDURES

The *Brady* Committee will consist of supervising deputy district attorneys as appointed by the District Attorney.

The function of the Committee is to determine whether a *Brady* issue is presented that requires a formal determination. The committee shall review materials collected, direct any additional investigations, and make a final recommendation to the Assistant District Attorney as to whether specific information does or does not constitute *Brady* material.

B. EVIDENTIARY STANDARD

The standard that the Committee will use in making this recommendation is a preponderance of evidence that the purported *Brady* information constitutes evidence favorable to a defendant that is either exculpatory or impeaching and material to either guilt or punishment. The standard for materiality is that there exists a reasonable probability that, if the evidence were disclosed to the defense, the result of the proceeding would be different.

C. UNPROVEN ALLEGATIONS

Allegations that cannot be substantiated, are not credible, or are determined unfounded will not be deemed *Brady* material.

D. CRIMINAL ACTIVITY

If the information is deemed to constitute a potential crime, it will be referred to the appropriate agency for a criminal investigation.

E. WITNESSES FROM OUT-OF-COUNTY AGENCIES

The committee will not conduct a review of potential *Brady* material concerning parties who work for agencies not operating within the county and with whom there is no reasonable expectation that the party will be called to provide testimony in this county.

Law enforcement officers who testify in Kern County from the California Highway Patrol and correctional officers from the California Department of Corrections are included in the *Brady* review. Federal officers will not be included. Those employees will be evaluated on a case by case basis.

CHAPTER THREE

FORMAL DETERMINATION THAT AN EVENT OR DOCUMENT CONSTITUTES *BRADY* MATERIAL

The following guidelines and procedures will govern the *Brady* Committee's decision making and dissemination process:

I. MATERIALS, GUIDELINES AND PROCEDURES

A. EXAMPLES OF MATERIAL WHICH MAY BE REVIEWED BY THE COMMITTEE

1. Police Reports.
2. District Attorney investigative reports.
3. Reports and letters from witness' agency.
4. Criminal complaints and information.
5. Court conviction and sentencing documents.
6. Court transcripts.
7. Probation reports.
8. District Attorney case files.
9. Memorandums and documentation prepared by District Attorney personnel.
10. Criminal charges rejected for prosecution.
11. Any written response from the witness.

B. DUE PROCESS AND NOTIFICATION PROCEDURES

1. Presently employed law enforcement witnesses and their agencies will receive written notification of a potential *Brady* disclosure.
2. Upon the conclusion of the *Brady* Committee's evidence collection process, a listing of the evidentiary materials will be made available to the witness, or his or her legal representative, upon request. The witness, or his or her legal representative, will be allowed to view or have described to them material otherwise not available to them. The committee will evaluate internal memoranda to determine whether work product is appropriate for disclosure.

3. The witness shall have a sufficient opportunity, upon receipt of the description of the materials, to provide a written response.

4. All written materials, documents, and evidence the witness submits will be deemed relevant in the *Brady* Committee's decision-making process.

5. The witness shall be advised that any submitted items may be deemed discoverable.

II. *BRADY* DISCLOSURE DETERMINATION

The *Brady* Committee will prepare a memorandum for the Assistant District Attorney with a recommendation as to whether the material is *Brady* material and should be included in the office's *Brady* system.

When a decision is made to place a witness in the office's *Brady* system, the *Brady* Committee will send a notification letter to the presently employed law enforcement witness and his or her agency. The Committee will then have the witness' name placed on the respective *Brady* list which will be maintained on the shared attorney "K" drive of the office computer system.

III. ADMINISTRATIVE FILES

The materials reviewed and memoranda of conclusions shall be maintained in a separate *Brady* administrative file that will be maintained in a secure location in the Assistant District Attorney's executive office area. In those cases where the review determined the misconduct allegations are subject to discovery under *Brady v. Maryland*, a discovery *Brady* packet shall be included in the file for purposes of complying with the discovery obligations in future cases.

The information contained in these administrative files shall only be accessed for case-related purposes, and a written record shall be maintained as to the name of each employee who accesses the information and the case for which access was obtained. The substance of the information in the administrative files shall not be included in any computerized database.

It is unclear under present law whether court-ordered disclosure to the prosecution of material from peace officer personnel files gives rise to an obligation that the prosecution discloses the information in future cases pursuant to *Brady*. In order to ensure that officer's privacy rights in their personnel files are protected, the District Attorney's Office shall not maintain a depository of information obtained from personnel files pursuant to in-camera hearings. Instead *Brady/Pitchess* motions shall be invited in each future case in which the officer is a material witness.

CHAPTER FOUR

BRADY WITNESS SYSTEM

I. *BRADY* LISTS

A. The name of the witness with potential *Brady* material will appear on a list on the shared "K" drive. The *Brady* Committee shall maintain four separate lists in the system: 1) the *Brady* Police List; 2) the *Brady* Lab List; 3) the *Brady* Prison List; and 4) the *Brady* Others List.

B. It is the responsibility of all deputy district attorneys to check each list when preparing a case to determine if a witness' name is on the list and whether a *Brady* packet of discovery exists for a witness who is subpoenaed by or will testify on behalf of the prosecution, or if an invitation for the defense to bring a *Pitchess* motion must be extended. If the witness' name appears on any of the lists, the deputy district attorney should contact the Assistant District Attorney to determine the *Brady* information possessed within the District Attorney's Office.

C. Information from this system shall be used only *in the discharge of official duties* and in compliance with the obligations of *Brady v. Maryland*. Misuse of this system may subject an employee to disciplinary action.

II. DISTRICT ATTORNEY CASE FILE DOCUMENTATION, PROTECTIVE ORDERS AND DISSEMINATION TO DEFENSE

A. Accessing the *Brady* witness system and the existence of *Brady* material shall be noted in the district attorney case file.

B. If the witness is on a *Brady* list, the deputy may want to seek an in-camera review on the motions date for the court to review potential *Brady* material before discovery is provided to the defense attorney.

C. The deputy district attorney shall seek a protective order for any materials that are not a matter of public record that are to be turned over to the defendant (see attached sample). The trial deputy shall also notify the appropriate police agency or its counsel of such action.

D. The assigned deputy shall make a posting in the file of date, manner and type of *Brady* information disclosed and the name of the defense attorney or authorized representative to whom the information was given. *See, e.g., In re Brown* (1998) 17 Cal.4th 873, 881.

E. All the *Brady* information in a discovery packet shall be numbered and a receipt signed by the defendant, defense attorney, or the defense attorney's authorized representative shall be obtained and maintained in the case file.

III. TIMING OF DISCLOSURE TO DEFENSE

Fulfillment of the prosecution's obligation to provide discovery of *Brady* material is the sole responsibility of the individual deputy district attorney assigned to the case and shall be done without a defense request.

California cases have applied *Brady* to require disclosures before preliminary hearing. *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074 [disclosure of exculpatory and impeachment evidence required if favorable and material in that it would create a reasonable probability of altering magistrate's probable cause determination]; *People v. Gutierrez* (2013) 214 Cal.App.4th 343; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586.

IV. CLOSED CASES

Obligations under *Brady* continue even after a case is concluded (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 – 1261). Once it is determined that *Brady* material exists for a witness and that material casts doubt upon the correctness of the convictions (*Imbler v. Pachtman* (1976) 424 U.S. 409), the *Brady* Committee shall request a CJIS data query of all cases in which that witness testified at trial. The data query will include all cases from the date of the alleged misconduct to the present. The assigned trial deputy or their unit's supervising deputy district attorney, if the trial deputy is unavailable, will be notified to send letters to all defense attorneys of record or pro per defendants alerting them to the existence of potential *Brady* material. Notification letters need not be sent in closed cases where the defendant has pled guilty (*United States v. Ruiz* (2002) 536 U.S. 622).

V. ADMISSIBILITY OF EVIDENCE

Discovery and admissibility are different, and the assigned deputy shall decide if the admissibility of the matters discovered is to be challenged.

Attachment